Government of The Lao People's Democratic Republic v Thai-Lao Lignite (Thailand) Co Ltd (a Thai company)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC(ARB)-35–12 OF 2020
ATAN MUSTAFFA J
15 APRIL 2024

Arbitration — Award — Finality of arbitration proceedings — Whether defendant could re-arbitrate its dispute with plaintiff after earlier arbitral award in its favour was set aside by High Court on jurisdictional grounds — Whether Federal Court's setting aside of High Court's order directing parties to re-arbitrate their dispute meant parties could no longer re-arbitrate — Whether re-arbitration could only happen if Court sanctioned it as mandate and jurisdiction of arbitral tribunal ceased immediately after it delivered its final award — Whether defendant also lost power to re-arbitrate on grounds of res judicata and issue estoppel, estoppel by conduct/election and limitation — Whether plaintiff had satisfied threshold required to obtain anti-arbitration injunction against defendant — Arbitration Act 2005 ss 34(1) & 34(3)

The central issue in this appeal was whether the defendant, a Thai company, could commence fresh arbitration proceedings against the plaintiff after an award handed down in its favour against the plaintiff in a previous arbitration was set aside by the courts on jurisdictional grounds without deciding the substantive merits of the dispute between the parties. In its instant application ('OS') to injunct the defendant from commencing the new arbitration, the plaintiff argued that the setting aside of the previous arbitral award had finally decided the dispute between the parties and the defendant was barred from initiating a new arbitration. The defendant, on the other hand, contended that there was no such preclusion as the merits of its claim were never adjudicated upon. The dispute between the parties concerned, inter alia, a project development agreement ('PDA') between them. The PDA contained an arbitration agreement providing for arbitration at the Kuala Lumpur Regional Centre for Arbitration. In 2007, the defendant commenced arbitration proceedings when the plaintiff terminated the PDA. The arbitral tribunal found that the termination was wrongful and awarded the defendant damages. On the plaintiff's application under the Arbitration Act 2005 ('the AA'), the High Court set aside the award, finding that the arbitral tribunal had exceeded its jurisdiction. The High Court ordered a fresh arbitration before a new arbitral tribunal. Both the Court of Appeal ('COA') and the Federal Court ('FC') upheld the setting aside of the arbitral award. But the FC went a step further and set aside the High Court's order for re-arbitration, holding that the High Court had no power to make such an order ('the FC's decision'). Three

years after the FC's decision, the defendant notified the plaintiff that it intended to commence fresh arbitration proceedings under the PDA seeking damages for the plaintiff's wrongful termination and breach of the PDA. In the instant OS, the plaintiff contended that: (a) the FC's decision setting aside the High Court's order to re-arbitrate had decided, with finality, the dispute between the parties; (b) instead of applying to re-arbitrate immediately after the High Court set aside the arbitral award, the defendant elected to have the courts resolve the dispute by defending the award right up to the FC; (c) by its conduct, the defendant had led the plaintiff to believe that it was not interested in re-arbitration; hence, the defendant's sudden decision to re-arbitrate at such a late stage would seriously prejudice the plaintiff; (d) the defendant was time-barred under the Limitation Act 1953 from commencing the fresh arbitration; and (e) the move to re-arbitrate was an abuse of process as the defendant had already received compensatory damages in respect of the claims it had against the plaintiff in separate court proceedings in Thailand. The defendant, on the other hand, argued that: (i) the defendant was entitled to commence fresh arbitration as the appellate courts never went into the merits of the award; (ii) there was no question of re-litigating the same issues as the proceedings in Thailand were between different parties and involved different issues and reliefs; (iii) time-bar did not apply as the defendant gave notice of re-arbitration less than three years after the FC's decision; (iv) the defendant's exercise of its right to appeal right up to the FC to defend the arbitral award did not mean it had abandoned the right to re-arbitrate before a new tribunal; and (v) the FC's setting aside of the High Court's order to re-arbitrate was inconsequential as the defendant's contractual right to re-arbitrate arose independently from the arbitration agreement in the PDA and that right could not be lost merely by pursuing court proceedings to affirm that the arbitral award was valid.

Held, allowing the OS:

(1) The FC's decision dismissing the defendant's appeal in respect of the arbitral award had brought about finality to the dispute between the parties. By setting aside the High Court's order for re-arbitration, the FC had effectively determined that the parties could not re-arbitrate their dispute. This was because under s 34(1) and 34(3) of the AA, re-arbitration could not take place in the absence of a court order reviving the mandate of the arbitral tribunal. The mandate and jurisdiction of the arbitral tribunal ceased when it delivered its final award. As the tribunal had become functus officio, its mandate could not be revived to hear a re-arbitration unless the court specifically so ordered. The High Court did make such an order. But by setting that order aside, the FC sent an unequivocal message that re-arbitration should not be permitted and that the dispute should end with its decision. In the circumstances, there could not be said to be any

subsisting dispute left between the parties that was capable of being referred to a fresh arbitration (see paras 35, 41–43 & 48).

(2) The defendant's conduct following the FC's decision was relevant in that it did not give notice of intention to re-arbitrate immediately after the FC's decision but only did so after the Thai Supreme Court had delivered its decision in respect of separate court proceedings in Thailand commenced by the defendant and others against the Banpu Group concerning substantially the same claims that the defendant had made against the plaintiff. Having fully exhausted its avenues of legal challenge without success in the Malaysian courts but with some measure of success in the Thai courts, the defendant was no longer entitled to pursue yet another bite at the cherry by way of re-arbitrating its disputes with the plaintiff (see paras 49–51).

(3) Estoppel by election barred the defendant from pursuing re-arbitration against the plaintiff. The defendant abandoned its right to pursue fresh arbitration when it rejected the High Court's order to re-arbitrate and instead elected to appeal right up to the Federal Court against the High Court's setting aside of the arbitral award. The defendant could not now go back to exercising a right that was previously offered to it but which it unequivocally rejected. By pursuing its appeals in the Malaysian courts and continuing with its action against the Banpu Group in the Thai courts whilst not taking any steps to re-arbitrate under the PDA, the defendant had led the plaintiff to believe that it had abandoned re-arbitration. Allowing the defendant to change course and reverse its position at this late stage — after a lapse of more than 15 years since the PDA was terminated — was unjust and prejudicial to the plaintiff (see paras 65–84).

(4) The defendant was time-barred under the Limitation Act 1953 from re-arbitrating its dispute under the PDA. By the time the High Court set aside the arbitral award on 27 December 2012, the defendant's causes of action against the plaintiff for breach of contract and tort were already long time-barred. The limitation period would have expired by 5 October 2012, ie, six years after the plaintiff had wrongfully terminated the PDA. The defendant could not rely on s 30(5) of the Limitation Act to save itself from being time-barred because it never secured an order under that provision from the High Court at the time the award was set aside to exclude from the computation of the limitation period, the period between the commencement of the arbitration and the setting aside of the award. Even if, for argument's sake, the period excluded under s 30(5) was applied, the defendant would still be time-barred when it gave the plaintiff the notice of intention to re-arbitrate (see paras 105, 108, 121, 126 & 136).

(5) The plaintiff had met the high threshold to justify the grant of an anti-arbitration injunction in the exceptional circumstances of this case. Allowing the defendant to re-arbitrate would be oppressive, vexatious, unconscionable and an abuse of process against the plaintiff. The defendant, on the other hand, would not suffer injustice if the re-arbitration was restrained as it had already obtained an award of monetary compensation from the Thai proceedings in respect of its investments in the Hongsa project (see paras 139 & 141–142).

(6) The facts taken cumulatively showed an abuse of process by the defendant seeking duplicative remedies and re-litigating issues that had already been decided. The claims and issues in the proposed re-arbitration were substantially the same as those already ventilated at length and finally determined in the various forums. Res judicata in the form of issue estoppel and abuse of process applied to prevent the defendant's attempt to re-litigate (see para 143).

(7) It mattered not that some of the earlier decisions were between the defendant and other parties like the companies in the Banpu Group. Pubic interest in the finality of litigation and consistency of decisions remained the same. A broad approach to applying issue estoppel and abuse of process justified looking at the substance and not the form of the multiple proceedings. The defendant had already claimed for and been awarded its 'investment costs' in the Hongsa Project (which costs it had already received in full) and had its claims for 'loss of benefits' dismissed, notwithstanding that these were in proceedings involving some different parties. The defendant could not be permitted to pursue these same claims again in the proposed re-arbitration against the plaintiff under the PDA. To allow it would be to condone a vexatious attempt at double recovery (see paras 142 & 144–145).

[Bahasa Malaysia summary

Isu utama dalam rayuan ini adalah sama ada defendan, sebuah syarikat Thailand, boleh memulakan prosiding timbang tara baharu terhadap plaintif selepas award yang telah diberikan memihak kepada plaintif dalam timbang tara sebelumnya telah diketepikan oleh mahkamah atas alasan bidang kuasa tanpa memutuskan merit substantif pertikaian antara pihak-pihak. Dalam permohonan semasanya ('SP') untuk menginjunksi defendan daripada memulakan timbang tara baharu, plaintif berhujah bahawa pengetepian award timbang tara sebelum ini telah dengan muktamad memutuskan pertikaian antara pihak-pihak dan defendan telah dihalang daripada memulakan timbang tara baharu. Defendan pula berhujah bahawa tiada sebarang preklusi seperti itu kerana merit tuntutannya tidak pernah diputuskan. Pertikaian antara pihak berkenaan, antara lain, perjanjian pembangunan projek ('PPP') antara mereka. PPP mengandungi perjanjian timbang tara yang menyediakan timbang tara di Pusat Timbang Tara Serantau Kuala Lumpur. Pada tahun 2007, defendan

memulakan prosiding timbang tara apabila plaintif menamatkan PPP. Tribunal timbang tara mendapati bahawa penamatan itu adalah salah dan memberikan ganti rugi kepada defendan. Mengenai permohonan plaintif di bawah Akta Timbang Tara 2005 ('ATT'), Mahkamah Tinggi mengetepikan award tersebut, membuat dapatan bahawa tribunal timbang tara telah melebihi bidang kuasanya. Mahkamah Tinggi memerintahkan timbang tara baharu di hadapan tribunal timbang tara baharu. Kedua-dua Mahkamah Rayuan ('MR') dan Mahkamah Persekutuan ('PP') mengekalkan pengetepian keputusan timbang tara. Tetapi PP memutuskan selanjutnya dan mengetepikan perintah Mahkamah Tinggi untuk timbang tara semula, dengan memutuskan bahawa Mahkamah Tinggi tidak mempunyai kuasa untuk membuat perintah sedemikian ('keputusan PP'). Tiga tahun selepas keputusan PP, defendan memberitahu plaintif bahawa ia berhasrat untuk memulakan prosiding timbang tara baharu di bawah PPP untuk menuntut ganti rugi untuk penamatan salah plaintif dan pelanggaran PPP. Dalam SP semasa, plaintif berpendapat bahawa: (a) keputusan PP mengenepikan perintah Mahkamah Tinggi untuk menimbangtara semula telah memutuskan, dengan muktamad, pertikaian antara pihak-pihak; (b) dan dengan sebaliknya memohon untuk menimbangtara semula sejurus selepas Mahkamah Tinggi mengenepikan award timbang tara, defendan memilih supaya mahkamah menyelesaikan pertikaian dengan mempertahankan award itu sehingga PP; (c) dengan kelakuannya, defendan telah menyebabkan plaintif mempercayai bahawa ia tidak berminat untuk timbang tara semula; oleh itu, keputusan mengejut defendan untuk menimbang tara semula pada peringkat lewat sedemikian akan memprejudiskan plaintif secara serius; (d) defendan telah dihalang oleh had masa di bawah Akta Had Masa 1953 daripada memulakan timbang tara baharu; dan (e) langkah untuk menimbang tara semula adalah satu penyalahgunaan proses kerana defendan telah pun menerima ganti rugi pampasan berkenaan dengan tuntutan terhadap plaintif dalam prosiding mahkamah berasingan di Thailand. Defendan, sebaliknya, berhujah bahawa: (i) defendan berhak untuk memulakan timbang tara baharu kerana mahkamah rayuan tidak pernah membincangkan merit award; (ii) tidak ada persoalan untuk membicarakan semula isu yang sama seperti prosiding di Thailand adalah antara pihak yang berbeza dan melibatkan isu dan relif yang berbeza; (iii) had masa tidak terpakai kerana defendan memberi notis timbang tara semula kurang daripada tiga tahun selepas keputusan PP; (iv) defendan melaksanakan haknya untuk merayu sehingga PP untuk mempertahankan award timbang tara tidak bermakna ia telah meninggalkan hak untuk timbang tara semula di hadapan tribunal baharu; dan (v) PP mengenepikan perintah Mahkamah Tinggi untuk timbang tara semula adalah tidak penting kerana hak kontrak defendan untuk timbang tara semula timbul secara bebas daripada perjanjian timbang tara dalam PPP dan hak itu tidak boleh hilang hanya dengan meneruskan prosiding mahkamah untuk mengesahkan bahawa award timbang tara itu sah.

Diputuskan, membenarkan SP:

(1) Keputusan PP yang menolak rayuan defendan berkenaan dengan award timbang tara telah membawa kepada kemuktamadan kepada pertikaian antara pihak-pihak. Dengan mengetepikan perintah Mahkamah Tinggi untuk timbang tara semula, PP telah dengan berkesan memutuskan bahawa pihak-pihak tidak boleh menimbang tara semula pertikaian mereka. Ini kerana di bawah s 34(1) dan 34(3) ATT, timbang tara semula tidak boleh berlaku sekiranya tiada perintah mahkamah menghidupkan semula mandat tribunal timbang tara. Mandat dan bidang kuasa tribunal timbang tara terhenti apabila ia menyampaikan award terakhirnya. Memandangkan tribunal itu telah menjadi functus officio, mandatnya tidak boleh dihidupkan semula untuk mendengar timbang tara semula melainkan mahkamah mengarahkan secara khusus sedemikian. Mahkamah Tinggi memang membuat perintah sedemikian. Tetapi dengan mengetepikan perintah itu, PP menghantar mesej yang jelas bahawa timbang tara semula tidak boleh dibenarkan dan pertikaian itu harus berakhir dengan keputusannya. Dalam keadaan tersebut, tidak boleh dikatakan masih ada pertikaian yang tinggal antara pihak-pihak yang mampu dirujuk kepada timbang tara baharu (lihat perenggan 35, 41–43 & 48).

(2) Kelakuan defendan berikutan keputusan PP adalah relevan kerana ia tidak memberikan notis niat untuk menimbang tara semula serta-merta selepas keputusan PP tetapi hanya berbuat demikian selepas Mahkamah Agung Thai telah menyampaikan keputusannya berkenaan dengan prosiding mahkamah yang berasingan di Thailand dimulakan oleh defendan dan pihak lain terhadap Kumpulan Banpu berkenaan sebahagian besar tuntutan yang sama yang defendan telah buat terhadap plaintif. Setelah kehabisan sepenuhnya jalan cabaran undang-undang tanpa kejayaan di mahkamah Malaysia tetapi dengan beberapa ukuran kejayaan di mahkamah Thai, defendan tidak lagi berhak untuk meneruskan lagi 'another bite at the cherry' dengan cara menimbang semula pertikaiannya dengan plaintif (lihat perenggan 49–51).

(3) Estoppel by election menghalang defendan daripada meneruskan timbang tara semula terhadap plaintif. Defendan telah meninggalkan haknya untuk meneruskan timbang tara baharu apabila menolak perintah Mahkamah Tinggi untuk timbang tara semula dan sebaliknya memilih untuk merayu sehingga ke Mahkamah Persekutuan terhadap keputusan Mahkamah Tinggi mengenepikan award timbang tara. Defendan kini tidak boleh kembali untuk melaksanakan hak yang sebelum ini ditawarkan kepadanya tetapi ditolak dengan tegas. Dengan meneruskan rayuannya di mahkamah Malaysia dan meneruskan tindakannya terhadap Kumpulan Banpu di mahkamah Thai sementara tidak mengambil sebarang langkah untuk menimbang tara semula di

bawah PPP, defendan telah menyebabkan plaintif mempercayai bahawa ia telah meninggalkan timbang tara semula. Membenarkan defendan menukar haluan dan membalikkan kedudukannya pada peringkat akhir ini — selepas lebih daripada 15 tahun sejak PPP ditamatkan — adalah tidak adil dan memprejudiskan plaintif (lihat perenggan 65–84).

(4) Defendan telah dihalang had masa di bawah Akta Had Masa 1953 daripada menimbangtara semula pertikaiannya di bawah PPP. Pada masa Mahkamah Tinggi mengetepikan award timbang tara pada 27 Disember 2012, kausa tindakan defendan terhadap plaintif bagi pelanggaran kontrak dan tort telah pun dihalang untuk masa yang lama. Tempoh had akan tamat sebelum 5 Oktober 2012, iaitu, enam tahun selepas plaintif telah menamatkan PPP secara salah. Defendan tidak boleh bergantung pada s 30(5) Akta Had Masa untuk menyelamatkan dirinya daripada dihalang had masa kerana ia tidak pernah mendapatkan perintah di bawah peruntukan itu daripada Mahkamah Tinggi pada masa award itu diketepikan untuk mengecualikan daripada pengiraan tempoh had, tempoh antara permulaan timbang tara dan mengetepikan award. Walaupun, demi hujah, tempoh yang dikecualikan di bawah s 30(5) telah digunakan, defendan masih akan dihalang masa apabila ia memberi plaintif notis niat untuk menimbangtara semula (lihat perenggan 105, 108, 121, 126 & 136).

(5) Plaintif telah memenuhi ambang yang tinggi untuk mewajarkan pemberian injunksi anti-timbang tara dalam keadaan luar biasa kes ini. Membenarkan defendan untuk menimbang tara semula akan menjadi menindas, menyusahkan, tidak wajar dan penyalahgunaan proses terhadap plaintif. Defendan, sebaliknya, tidak akan mengalami ketidakadilan jika timbang tara semula itu dihalang kerana ia telah memperolehi award pampasan kewangan daripada prosiding Thai berkenaan dengan pelaburannya dalam projek Hongsa (lihat perenggan 139 & 142–141).

(6) Fakta yang diambil secara kumulatif menunjukkan penyalahgunaan proses oleh defendan yang mencari remedi berganda dan membicarakan semula isu yang telah diputuskan. Tuntutan dan isu dalam timbang tara semula yang dicadangkan adalah sama dengan yang telah didedahkan dengan panjang lebar dan akhirnya ditentukan dalam pelbagai forum. Res judicata dalam bentuk isu estoppel dan penyalahgunaan proses digunakan untuk menghalang percubaan defendan untuk membicarakan semula (lihat perenggan 143).

(7) Tidak kira bahawa beberapa keputusan awal adalah antara defendan dan pihak lain seperti syarikat dalam Kumpulan Banpu. Kepentingan awam terhadap kemuktamadan litigasi dan ketekalan keputusan tetap sama. Pendekatan yang luas untuk menggunakan isu estoppel dan penyalahgunaan proses wajar melihat bahan dan bukan bentuk

prosiding berganda. Defendan telah pun menuntut dan telah diberikan 'kos pelaburan'nya dalam Projek Hongsa (yang kosnya telah diterima sepenuhnya) dan tuntutannya untuk 'kehilangan faedah' ditolak, walaupun ini dalam prosiding melibatkan beberapa pihak berbeza. Defendan tidak boleh dibenarkan untuk meneruskan tuntutan yang sama sekali lagi dalam cadangan timbang tara semula terhadap plaintif di bawah PPP. Untuk membenarkannya adalah untuk membenarkan percubaan yang menyakitkan untuk pemulihan berganda (lihat perenggan 142 & 144–145).]

Cases referred to

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202, HC (refd)
Annie Quah Lay Nah vSyed Jafer Properties Sdn Bhd & Ors [2007] 1 MLJ 225, CA (folld)
Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd [2016] 3 MLJ 122, CA (refd)
Dceil Imex Sdn Bhd v Pembinaan Punca Cergas Sdn Bhd [2014] 8 MLJ 51, HC (distd)
Ghulam Mohammad Sayeed & Ors v Perwira Habib Bank (Malaysia) Bhd & Ors [1989] 2 MLJ 375, HC (distd)
J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd [2007] EWHC 1262 (TCC), QBD (refd)
Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors [2019] 5 MLJ 1, FC (refd)
Kerajaan Malaysia v Mat Shuhaimi bin Shafiei [2018] 2 MLJ 133; [2018] 3 CLJ 1, FC (refd)
Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565; [1997] 3 CLJ 305, FC (folld)
Othman & Anor v Mek [1972] 2 MLJ 158, FC (refd)
Ramdutt Ramkissendass v ED Sassoon and Company [1929] LR 56 IA 128, PC (refd)
Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic [2017] MLJU 1196; [2017] 9 CLJ 273, FC (refd)
Todd Petroleum Mining Company Limited v Shell (Petroleum Mining) Company Limited from New Zealand and Henry Rooke, Sons & Co v Piper & May [1927] 28 Lloyd's Report 49 (refd)

Legislation referred to

Arbitration Act 1996 [NZ]
Arbitration Act 2005 ss 18(8), 34, 34(1), 3), 37, 37(1)(a)(iv), (1)(a)(v)
Limitation Act 1953 ss 6(1)(a), 30(5)

Cyrus Das (with Lam Ko Luen and Nina Lai Jian Xian) (Shook Lin & Bok) for the plaintiff.

Kwan Will Sen (with Wong Chee Chien) (Lim Chee Wee Partnership) for the defendant.

Atan Mustaffa J:

[1] This judgment concerns an application by the plaintiff seeking declaratory and injunctive reliefs to prevent the defendant from commencing a new arbitration under a certain agreement between them. The central issue is whether the defendant should be allowed to start fresh arbitration proceedings after a previous arbitration between the parties was set aside by the courts on jurisdictional grounds, without deciding the substantive merits of the dispute.

[2] The plaintiff argues that the court's decision affirming the setting aside of the prior arbitral award has brought finality to the entire dispute, thereby barring the defendant from initiating a new arbitration. The defendant, on the other hand, contends that it is not precluded from commencing fresh arbitration under the agreement, as the courts had only invalidated the previous arbitration award due to jurisdictional defects, without adjudicating the actual merits of the parties' underlying substantive claims and dispute.

[3] The case arises in the context of a development project governed by the agreement between the parties. While the underlying facts pertain to that specific project, the legal issues center around the effect of a court setting aside an arbitral award without deciding the merits — whether that forecloses all future arbitration between the parties on the same subject matter.

BACKGROUND FACTS

[4] The defendant, a Thai company, and the plaintiff, the Government of the Lao People's Democratic Republic entered into the following agreements:

(a) agreement of Lignite Survey and Mining in the Hongsa District, Udomchai Sub-district of Laos dated 29 May 1992 ('first mining contract'), granting the defendant a concession to carry out lignite mining work in the Hongsa District of Laos for 15 years, renewable for five years each with mutual consent;

(b) additional agreement dated 21 July 1993 ('second mining contract') amending the first mining contract to extend the concession area from 20 sqkm to 60 sqkm. Together, the first and second mining contracts are referred to as the 'mining contracts';

(c) project development agreement dated 22 July 1994 ('PDA'), granting the defendant the exclusive mandate and rights for the construction of a power plant in the Hongsa District to generate electricity supply to Thailand through the Electricity Generating Authority of Thailand; and

(d) Hongsa-Lignite (Laos) Co Ltd ('HLL') was established by the defendant and licensed by the plaintiff to undertake the Lignite Survey and Mining Project under the mining contracts. Thai-Lao Power Co Ltd ('TLP') was to be formed by the defendant to implement the project under the PDA ('Hongsa Project').

[5] The PDA contained an arbitration agreement providing for arbitration in Malaysia at the Kuala Lumpur Regional Centre for Arbitration under the UNCITRAL Arbitration Rules 1976. The governing law of the PDA was a mixture of Laotian law and New York law.

[6] On 4 September 2006, the plaintiff issued a notice of default to the defendant citing its failure to comply with obligations under the PDA and giving 30 days to remedy. On 5 October 2006, the plaintiff terminated the PDA. On 11 October 2006, the plaintiff terminated the mining contracts.

[7] On 26 June 2007, the defendant and HLL commenced an ad-hoc arbitration against the plaintiff under the PDA and UNCITRAL Rules ('2007 Arbitration'), claiming the plaintiff breached the PDA by improperly terminating it without cause and following prescribed procedures. The arbitral tribunal delivered an award on 4 November 2009 ('award') finding the plaintiff had wrongfully terminated the PDA and awarding the defendant and HLL damages exceeding USD56m.

[8] On 5 October 2010, the plaintiff applied to the High Court in Malaysia, the seat of arbitration, to set aside the award under the Arbitration Act 2005. On 27 December 2012, the High Court set aside the award, finding the arbitral tribunal had exceeded jurisdiction, with a consequential order for re-arbitration before a new tribunal confined only to the PDA. The Court of Appeal dismissed the defendant's appeal on 29 January 2014, as did the Federal Court on 17 August 2017, affirming the setting aside of the award but also setting aside the order for re-arbitration ('the Federal Court decision').

[9] On or about 15 July 2007, the defendant, Mr Siva Nganthavee, HLL, TLP and South East Asia Power Co Ltd (collectively 'the TLL Group') commenced proceedings in Thailand against Banpu Public Co Ltd ('Banpu'), Banpu International Co Ltd ('Banpu International'), Banpu Power Co Ltd ('Banpu Power') and some of their directors (collectively 'Banpu Group'). On 6 March 2018, the Supreme Court of Thailand found in favour of the TLL Group and ordered Banpu, Banpu International and Banpu Power to jointly pay the TLL Group damages of THB1.5 billion plus interest.

[10] On 27 March 2020, the defendant issued a notice of intention ('NOI') to the plaintiff to commence fresh arbitration under the PDA. On 13 July

2020, the defendant issued a notice of arbitration to commence a new ad-hoc arbitration under the PDA and UNCITRAL Rules 1976 ('2020 Arbitration'), seeking declarations that the plaintiff wrongfully terminated and breached the PDA, and damages exceeding USD450m.

[11] On 10 December 2020, the plaintiff commenced the present proceedings in the High Court of Malaya seeking declaratory and injunctive reliefs against the defendant in respect of the 2020 Arbitration.

THE ORIGINATING SUMMONS

[12] In the originating summons dated 10 December 2020 herein, the plaintiff prays for the following reliefs against the defendant (stated verbatim):

(a) a declaration that the decision of the Federal Court of Malaysia on 17.8.2017 dismissing the appeal of the defendant based on the Arbitration Award dated 4.11.2009 ('Award') between the Parties has brought about finality to the dispute between the Parties;

(b) further and/or alternatively, a declaration that the defendant is estopped from commencing a fresh arbitration against the plaintiff under the Project Development Agreement dated 22.7.1994 ('PDA');

(c) further and/or alternatively, a declaration that any fresh arbitration would be an abuse of process and an unjust enrichment by the defendant; having already obtained monetary relief for the alleged losses from the 'Hongsa Project' from a decision of the Supreme Court of Thailand where the defendant was a claimant;

(d) further and/or alternatively, a declaration that any fresh arbitration on the issues of the termination of the PDA, the alleged collusion between the plaintiff and Banpu Public Co. Ltd. ('Banpu'), and the defendant's claim for 'loss of benefit' / 'loss of profit" from the 'Hongsa Project' would be an abuse of process by the defendant as the defendant is bound by the decision of the Supreme Court of Thailand;

(e) further and/or alternatively, a declaration that the defendant is time-barred from commencing a fresh arbitration against the plaintiff under the PDA;

(f) an order that the defendant be restrained, either through itself and/or its solicitors and/or its agents or otherwise from taking any further steps in the arbitration proceedings commenced or sought to be commenced by the defendant against the plaintiff via a Notice of Arbitration dated 13.7.2020;

(g) that costs of this application be borne and paid forthwith by the defendant; and

(h) such further and/or other relief as this Honourable Court deems fit and proper.

THE PLAINTIFF'S SUBMISSIONS

[13] The plaintiff submits that the defendant should be restrained from proceeding with the proposed 2020 Arbitration on the grounds below.

[14] The plaintiff contends that the Federal Court decision dated 17 August 2017, in upholding the setting aside of the award and setting aside the order for re-arbitration, has brought about finality to the dispute between the parties. According to the plaintiff, no dispute continues to exist between them.

[15] The plaintiff argues that the defendant is estopped from commencing the 2020 Arbitration by reason of its conduct in the 2007 Arbitration and the Malaysian court proceedings. The plaintiff submits that the defendant had the opportunity to re-arbitrate the dispute when the award was set aside but elected instead to reject that and defend the award up to the Federal Court. Having made that election, the plaintiff contends the defendant is bound by the Federal Court's decision bringing finality to the dispute.

[16] The plaintiff submits that the 2020 Arbitration amounts to an abuse of process as the defendant has already obtained monetary relief against the Banpu Group in Thailand for the same or substantially similar claims it now seeks to bring against the plaintiff. The plaintiff argues this is an attempt at double recovery.

[17] The plaintiff contends that issues of termination of the PDA, alleged collusion between the plaintiff and Banpu, and the claim for 'loss of benefits' have been determined by the Supreme Court of Thailand against the defendant. According to the plaintiff, the defendant is bound by these findings and re-litigating these issues in the proposed arbitration would be an abuse of process.

[18] The plaintiff submits that the defendant's claims in the 2020 Arbitration are time-barred under Malaysian limitation law as the relevant limitation periods, running from when the causes of action accrued, have expired. The plaintiff argues that the defendant is thus precluded from commencing the 2020 Arbitration.

[19] Based on the above grounds, the plaintiff seeks a permanent anti-arbitration injunction to restrain the defendant from proceeding with the 2020 Arbitration. The plaintiff submits that not granting an injunction would cause the plaintiff injustice, while allowing the arbitration to continue would be oppressive, vexatious, unconscionable and an abuse of process.

THE DEFENDANT'S SUBMISSIONS

[20] The defendant submits that the plaintiff's application should be dismissed in its entirety for the reasons below.

[21] The defendant contends that the court should not intervene in the 2020 Arbitration as there is a valid and binding arbitration agreement between the parties under the PDA. The defendant argues that the law favours minimal court intervention in arbitration.

[22] According to the defendant, the Federal Court decision did not deal with the merits of the parties' dispute and therefore did not bring about finality. The defendant submits that the setting aside of the award due to the tribunal exceeding its jurisdiction does not preclude the defendant from commencing fresh arbitration.

[23] The defendant argues that the decisions in the Thai Proceedings do not bar it from re-arbitrating its claims against the plaintiff as the Thai Proceedings involved different parties, issues and reliefs from the proposed arbitration. The defendant contends there is no re-litigation or double recovery.

[24] The defendant submits it is not time-barred from commencing the 2020 Arbitration. The defendant argues that under the PDA's governing law of New York, the plaintiff has not shown the claims are time-barred. Even under Malaysian law, the defendant contends time has not run out as the court can exclude the period between the commencement of the previous arbitration and its setting aside.

[25] The defendant argues that the doctrine of estoppel by election does not apply to bar the 2020 Arbitration. The defendant submits that in appealing the setting aside of the award, it was merely exercising its legal rights and did not elect between two inconsistent courses of action.

[26] According to the defendant, the plaintiff has failed to meet the high threshold for granting an anti-arbitration injunction. The defendant contends that the balance of justice favours allowing the 2020 Arbitration to proceed as the defendant would suffer injustice if deprived of its contractual right to arbitrate, while the plaintiff has not shown the arbitration would be oppressive or vexatious.

ANALYSIS AND FINDINGS OF THE COURT

Finality of the dispute by the Federal Court decision

[27] The plaintiff submits that the Federal Court decision dismissing the defendant's appeal against the setting aside of the award effectively disposed of the matter with finality. The plaintiff contends that by setting aside the award and setting aside the High Court's order for re-arbitration, the Federal Court decisively determined that there should be no further arbitration between the parties.

[28] The plaintiff argues that the defendant had the opportunity to re-arbitrate the dispute when the High Court first set aside the award, but instead chose to appeal that decision all the way to the Federal Court. According to the plaintiff, the defendant's conduct in pursuing the appeals rather than accepting the re-arbitration order shows that it had elected to have the courts finally resolve the dispute.

[29] The plaintiff submits that the Federal Court, as the apex court of Malaysia, has the final word on the matter, and its decision is binding and conclusive on the parties. The plaintiff contends that allowing the defendant to commence a fresh arbitration via the 2020 Arbitration now would be tantamount to reopening a matter that has already been finally decided by the courts and would undermine the principle of finality in litigation.

[30] The defendant contends that the question of whether the Federal Court's decision brings finality to the dispute between the parties must be considered in light of New York law, which is the governing law of the PDA. The defendant argues that as a matter of New York law, the Federal Court's decision does not bring about finality to the dispute between the parties.

[31] The defendant submits that in any event the Federal Court's dismissal of its appeal did not determine the merits of the dispute and therefore did not bring finality to the matter. The defendant argues that the courts only set aside the award on the ground that the tribunal had exceeded its jurisdiction, without making any ruling on the substantive issues in dispute.

[32] According to the defendant, the setting aside of an arbitral award on jurisdictional grounds does not preclude the parties from re-arbitrating the dispute on its merits before a new tribunal. The defendant contends that the arbitration agreement in the PDA remains valid and binding, and the defendant is entitled to commence the 2020 Arbitration to have its claims heard and decided.

[33] The defendant submits that the Federal Court's removal of the High Court's order for re-arbitration does not affect the defendant's right to commence a new arbitration, as that right arises independently from the

arbitration agreement itself. The defendant argues that it would be unjust to deprive it of its contractual right to arbitrate its claims, as the merits have never been properly adjudicated.

[34] The defendant contends that the principle of finality in litigation does not apply in this case, as arbitration and court proceedings are separate and distinct. The defendant submits that the courts' role is limited to determining challenges to arbitral awards and does not extend to resolving the underlying dispute between the parties if the award is set aside.

[35] Having considered the submissions of the parties and the affidavit evidence, I find that the decision of the Federal Court decision on 17 August 2017 dismissing the defendant's appeal based on the award dated 4 November 2009 between the parties has brought about finality to the dispute between the parties. My reasons are as follows.

[36] Firstly, the question of which law governs the issue of whether the Federal Court's decision brings finality to the dispute between the parties must be determined in accordance with Malaysian law, not New York law. This is firmly established by the Federal Court decision, the judgment of which was reported in *Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic* [2017] MLJU 1196; [2017] 9 CLJ 273. There, the apex court conclusively determined that the arbitration agreement contained in art 14.1 of the PDA between the parties is governed by Malaysian law. The relevant excerpts of the Federal Court's judgment state:

> [162] The law applicable to the arbitration agreement 'governs its validity, interpretation and effect' (*Halsbury's Law of England* (4th Ed) Reissue Vol 2(3) at para 6). '… it governs the obligation to submit disputes to arbitration and to honour any award' (*Russell on Arbitratio*n (24th Ed) at 2–113) …
>
> [186] Given that the UNCITRAL Arbitration Rules 1976 and the AA 2005 had adopted the conflict of laws rules approach to determine the law applicable to the substance of the dispute, it should follow that the conflict of laws rules should also determine the law applicable to the arbitration agreement. When the parties herein designated Kuala Lumpur as the seat, they also implicitly accepted the conflict of laws rules approach to determine the applicable law.
>
> [187] Under the conflict of laws rules, the law that has the closest and most real connection to the arbitration agreement is the law applicable to the arbitration agreement. In the instant case, the arbitration was conducted in Malaysia at the Kuala Lumpur Regional Centre for Arbitration. Since the arbitration was conducted in Malaysia, the AA 2005 (with the exception of Part III) was the lex arbitrii. Since the seat was Kuala Lumpur, AA 2005 was also the curial law (see *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441; [2012] 3 CLJ 423 at [25] where Richard Malanjum CJ (Sabah and Sarawak), delivering the judgment of the court, agreed that the *curial law ought to be that of the*

seat of arbitration, and *Government of India v Petrocon India Limited* [2016] 6 CLJ 321; [2016] 6 MLJ 435 at [33], where Arifin Zakaria CJ, delivering judgment of the court, said that 'the seat of arbitration will determine the curial law that will govern the arbitration proceeding'). The AA 2005 was the lex arbitrii and the curial law. That pointed to the law of Malaysia with the closest connection to the arbitration agreement. New York law had no connection to the arbitration agreement. The PDA required the arbitral tribunal to be trained in New York law. But that was because New York law governed the substance of the dispute. The parties submitted on New York law. But that was to address to the third party beneficiary issue. Only the law of Malaysia had the connection, the closest and most real at that, to the arbitration agreement. *Under the conflict of laws rules, the law applicable to the arbitration agreement should be the law of Malaysia*. That conclusion on the applicable law should be the same even if the three stage test espoused in Sulamerica were applied, as the parties' adoption of the UNCITRAL Arbitration Rules 1976 implied a choice of the law applicable to the seat. There was a tacit choice of Malaysian law to govern the arbitration agreement ... (Emphasis added.)

[37] The 'arbitrability of disputes' clearly falls within the scope and ambit of the arbitration agreement. The issue of whether any dispute still exists between the parties that is capable of being referred to arbitration goes to the heart of the arbitration agreement's validity, interpretation and effect. It is a core question pertaining directly to the parties' obligation to submit disputes to arbitration.

[38] Following the Federal Court decision, this issue must necessarily be determined by applying Malaysian law as the law governing the arbitration agreement and as the curial law of the arbitration. There is no basis to consider New York law, as it is only the governing law of the underlying PDA but not the arbitration agreement itself. The evidence of the defendant's New York law expert is therefore wholly irrelevant for this court's consideration of the issue at hand. In accordance with the doctrine of stare decisis, this court is bound to apply Malaysian law, not New York law, in determining whether the Federal Court's earlier decision has brought about finality to the dispute between the parties.

[39] Secondly, in allowing the plaintiff's application to set aside the award pursuant to s 37 of the Arbitration Act 2005, the Federal Court had specifically set aside the part of the decision of the High Court, which was affirmed by the Court of Appeal, that there should be a re-arbitration of the dispute between the parties. Section 37 sets out the limited grounds upon which the High Court may set aside an arbitral award. The relevant parts of s 37 provide:

(1) An award may be set aside by the High Court only if —

(a) the party making the application provides proof that —

...

A (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) the award contains decisions on matters beyond the scope of the submission to arbitration;

B ...

[40] Here, the Federal Court affirmed the setting aside of the award under s 37(1)(a)(iv) and (v) on the basis that the Arbitral Tribunal had exceeded its jurisdiction by dealing with disputes falling outside the scope of submission to C arbitration. Critically, in doing so, the apex court expressly set aside the High Court's order for re-arbitration of the dispute that was allowed to stand by the Court of Appeal. The Federal Court held:

D [245] The appellants could be right on the third party beneficiary point. But even so, the second appellant could only be an intended third party beneficiary under the mining contracts. As such, the second appellant could not invoke art 14.1 of the PDA. That added reason to set aside the award, apart from the fact that the High Court had no powers to order re-arbitration.

E [246] For reasons stated, we unanimously dismiss this appeal with costs and set aside the order for a re-arbitration.

[41] In my view, by setting aside the order for re-arbitration, the Federal Court had effectively determined that the parties cannot re-arbitrate their F disputes. This is because under ss 34(1) and 34(3) of the Arbitration Act 2005, a re-arbitration cannot take place in the absence of a court order reviving the mandate of the arbitral tribunal. Section 34(1) provides that '[t]he arbitral proceedings shall be terminated by the final award', while s 34(3) states '[t]he mandate of the arbitral tribunal shall terminate with the termination of the G arbitral proceedings, subject to the provisions of sections 35 and 37'.

[42] In this case, the award delivered on 4 November 2009 was undoubtedly a final award under s 34 which terminated the arbitral proceedings between the parties that were commenced by the notice of arbitration dated 26 June 2007. H By virtue of the clear words of s 34(3), the mandate and jurisdiction of the tribunal therefore ceased upon delivery of this final award. Once the arbitral tribunal becomes functus officio, its mandate cannot be revived to hear a re-arbitration unless the court specifically so orders. That is what the High Court purported to do in the present case when it set aside the award. The High I Court's sealed order dated 27 December 2012 incorporated a specific directive that the dispute between the parties under the PDA be re-arbitrated before a new panel. This order effectively revived the arbitral tribunal's mandate, granting it a fresh jurisdiction to re-commence arbitration limited to the PDA claims.

[43] However, the Federal Court in its judgment dated 17 August 2017 expressly set aside the High Court's order for re-arbitration. This is clear from para [246] of the Federal Court's judgment which unanimously ordered 'and set aside the order for a re-arbitration.' The Federal Court was well aware that the Court of Appeal had affirmed the re-arbitration order without modification. By deliberately setting aside this part of the High Court's order, the apex court was sending an unequivocal message that re-arbitration should not be permitted and the dispute should end with its decision.

[44] The Federal Court's setting aside of the re-arbitration order has the critical effect of once again terminating the arbitral tribunal's mandate in its entirety, this time without any further recourse by virtue of ss 34(1) and 34(3) of the Arbitration Act 2005. The possibility of re-arbitration which was initially kept alive by the High Court has now been conclusively extinguished by the Federal Court's intervention. Where the highest court of the land has shut the door on re-arbitration, the inevitable consequence is that it has brought finality to the dispute between the parties.

[45] Support for this conclusion can also be drawn from the common law position as recognised in *Ramdutt Ramkissendass v ED Sassoon and Company* [1929] LR 56 IA 128. The Privy Council held that if an award is set aside and a new arbitration takes place, the new arbitration is not deemed a mere continuation of the former arbitration. Applying this to the present facts, the proposed fresh arbitration commenced by the defendant's notice of arbitration dated 13 July 2020 cannot be considered a continuation of the earlier 2007 Arbitration which spawned the award that was set aside. In law, it is a separate proceeding that can only take place if the court exercises its power to revive the arbitral tribunal's mandate.

[46] This is illustrated by cases such as *Todd Petroleum Mining Company Limited v Shell (Petroleum Mining) Company Limited from New Zealand and Henry Rooke, Sons & Co v Piper & May* [1927] 28 Lloyd's Report 49 from the English courts. These authorities demonstrate that where an arbitral award is set aside for want of jurisdiction thus terminating the tribunal's mandate, it is not uncommon for the court to then make a further order reinstating the tribunal's jurisdiction to enable a re-hearing or re-arbitration of the dispute. Such an order is necessary as it is the only way for the tribunal (whether the original panel or a freshly constituted one) to be re-vested with jurisdiction to determine the dispute after its initial mandate has ceased. The Arbitration Act 2005, which is modelled on the New Zealand Arbitration Act 1996 and the UNCITRAL Model Law, operates on the same footing.

[47] Seen in this light, the legal effect of the Federal Court expressly setting aside the re-arbitration order made by the High Court and affirmed by the

Court of Appeal is highly significant. Plainly, the Federal Court had intended to shut the door on any further arbitration of this long-running dispute. If there was to be no finality, the apex court would have simply dismissed the defendant's appeal and affirmed the Court of Appeal's order in its entirety, leaving the re-arbitration directive undisturbed.

[48] Indeed, this must be deemed the manifest intention of the Federal Court after the parties' respective cases have been fully ventilated across three tiers of the Malaysian courts — for finality to be brought to the dispute upon the legal avenues and remedies being exhausted. The defendant cannot be permitted to side-step the consequence of the Federal Court's decision by commencing the proposed fresh arbitration, which is legally a separate proceeding from the earlier arbitration. To do so would be to act contrary to the terms of the apex court's order as well as the underlying rationale of it. In the circumstances, there cannot be said to be any subsisting dispute left between the parties that is capable of being referred to a fresh arbitration.

[49] Fourthly, I also find the conduct of the defendant after the Federal Court decision to be relevant in determining whether the defendant still treated the disputes as subsisting for the purposes of a Malaysian arbitration. Tellingly, the defendant did not commence the 2020 Arbitration immediately after the Federal Court upheld the setting aside of the award on 17 August 2017. Instead, the defendant waited until after the Supreme Court of Thailand handed down its decision on 6 March 2018 in respect of separate court proceedings in Thailand commenced by the defendant and others against the Banpu Group. Only then did the defendant issue its NOI dated 27 March 2020 to commence the 2020 Arbitration against the plaintiff.

[50] It is evident that the defendant had consciously chosen to await the outcome of the Thai Proceedings before deciding whether to launch a fresh arbitration via the 2020 Arbitration in Malaysia against the plaintiff based substantially on the same set of claims related to the Hongsa Project that were raised in the Thai Proceedings. When presented with the opportunity to re-arbitrate after the High Court first set aside the award (before this was affirmed by the Court of Appeal and Federal Court), the defendant elected instead to attempt to defend the award up to the Federal Court and thereafter to pursue its claims in the Thai Proceedings up to the Thai Supreme Court.

[51] Having fully exhausted its avenues of legal challenge without success in the Malaysian courts but with some measure of success in the Thai courts, the defendant is no longer entitled to pursue yet another bite at the cherry by way of the 2020 Arbitration. If the defendant had genuinely believed that disputes still existed that could be re-arbitrated in Malaysia, it would and should have

promptly commenced a fresh arbitration after the Federal Court conclusively set aside the award, rather than adopt a wait-and-see approach pending the resolution of the Thai Proceedings.

[52] For the reasons set out above, I find that the Federal Court decision on 17 August 2017 dismissing the defendant's appeal in respect of the award between the parties has indeed brought about finality to the dispute between the parties. There is no subsisting dispute that can be referred to a fresh arbitration. Accordingly, I grant the declaration in prayer (a) of the originating summons that the Federal Court's decision has brought about finality to the dispute between the parties and no dispute thus continues to exist between the parties for reference to arbitration.

Estoppel arising from the doctrine of election

[53] On the issue of whether the defendant is estopped by its election in the setting aside proceedings from now commencing the proposed fresh arbitration, the plaintiff submits that the defendant, having elected to pursue the appeals against the setting aside of the award, is now precluded from seeking to re-arbitrate the dispute. The plaintiff argues that when the High Court set aside the award and ordered re-arbitration limited to the PDA, the defendant had a choice between accepting the order and commencing a fresh arbitration, or rejecting it and appealing the decision.

[54] According to the plaintiff, the defendant unequivocally elected to reject the re-arbitration order and instead pursued appeals up to the Federal Court, thereby demonstrating its intention to have the courts finally resolve the dispute. The plaintiff contends that having made this election, the defendant is bound by the Federal Court decision disposing of the matter, and cannot now resile from its earlier position and seek to re-arbitrate.

[55] The plaintiff submits that the doctrine of estoppel by election prevents a party from approbating and reprobating, or blowing hot and cold. The plaintiff argues that allowing the defendant to commence a fresh arbitration now, after it had steadfastly opposed re-arbitration and pursued the appeals, would be inconsistent with its earlier conduct and would amount to an abuse of process.

[56] The plaintiff contends that it had acted in reliance on the defendant's election to pursue the appeals and not to re-arbitrate, and it would suffer prejudice if the defendant is allowed to change its position at this late stage. The plaintiff submits that the defendant's conduct has led to a substantial delay in the resolution of the dispute, and it would be unjust to compel the plaintiff to defend a fresh arbitration after such a long lapse of time.

A **[57]** On this issue, the defendant contends that the issue of election of remedies should be determined by New York law as the governing law of the PDA. The defendant relies on its New York law expert's affidavit which opines that under New York law, the doctrine of election of remedies is inapplicable to this case.

B

[58] The defendant submits that even if Malaysian law applies, the doctrine of estoppel by election does not apply in this case. The defendant argues that in appealing against the setting aside of the award, it was merely exercising its legal right to challenge the court's decision, and this does not amount to an election C between two inconsistent courses of action.

[59] The defendant contends that the choice it faced was not between accepting the re-arbitration order and appealing the setting aside of the award, but rather between accepting the setting aside of the award or challenging it on D appeal. The defendant submits that it had consistently maintained its position that the award should be upheld, and it did not at any point elect to abandon its claims or to accept the re-arbitration order.

E **[60]** According to the defendant, the pursuit of the appeals and the commencement of a fresh arbitration are not mutually exclusive or inconsistent options. The defendant argues that even if it had succeeded in the appeals and the award was reinstated, it would still have been open to the defendant to commence a fresh arbitration if the award was later set aside by the courts of the F seat of arbitration.

[61] The defendant submits that it did not gain any advantage or benefit from pursuing the appeals, nor did the plaintiff suffer any detriment in reliance on the defendant's actions. The defendant contends that the plaintiff's G complaint about delay is not a valid basis for estoppel, as any delay was caused by the plaintiff's own decision to challenge the award and the time taken for the courts to dispose of the appeals.

[62] The defendant argues that the right to arbitrate is a contractual right H that cannot be waived or lost merely by pursuing court proceedings to challenge an award. The defendant submits that it would be unjust to deprive it of its right to have its claims determined on the merits by a new arbitral tribunal, solely on account of its efforts to uphold the original award.

I **[63]** Having carefully considered the submissions of both parties and the evidence presented, I find that the defendant is estopped by its election in the setting aside proceedings from now commencing the 2020 Arbitration.

[64] On the issue of the election of remedies doctrine being inapplicable as a

matter of New York law, again it is my view that the issue of election of remedies is to be decided by the application of Malaysian law because it goes to the 'arbitrability of disputes' between the parties. This has has been settled by the Federal Court in *Thai-Lao Lignite Co Ltd & anor v Government of the Lao People's Democratic Republic* which held that Malaysian law governs the arbitration agreement between the parties. New York law does not come into play as regards the matters raised in this action.

[65] I find that estoppel by election bars the defendant from now pursuing the 2020 Arbitration based on the following:

(a) the defendant had earlier proceeded with its claims based on the Hongsa Project on two fronts — against the plaintiff in the 2007 Arbitration in Malaysia on 26 June 2007 and against the Banpu Group in the Thai Proceedings on 15 July 2007;

(b) when the High Court set aside the award on 27 December 2012 and gave the consequential order for re-arbitration confined to the dispute arising under the PDA only, the defendant and HLL, a company formed by the defendant, were presented with two mutually exclusive courses of action moving forward, ie to appeal against the High Court decision or to accept the High Court decision and commence a fresh arbitration under the PDA;

(c) the defendant rejected the High Court decision on re-arbitration, opting to appeal against the High Court decision to defend the correctness of the award up to the Federal Court and in doing so did not to seek an order under s 30(5) of the Limitation Act 1953 ('the Limitation Act') to exclude the period from the commencement of the 2007 Arbitration to the High Court decision for purposes of computing limitation periods;

(d) the defendant also continued to pursue its action against the Banpu Group in the Thai Proceedings until being awarded the sum of USD50m as 'investment costs' as determined by the Supreme Court of Thailand on 6 March 2018;

(e) the defendant then waited for the Federal Court decision on 17 August 2017 which dismissed the defendant's appeal but set aside the part of the decision of the High Court as affirmed by the Court of Appeal that there should be a re-arbitration of the dispute between the parties; and

(f) despite being awarded the sum of USD50m as 'investment costs' in the Thai Proceedings as determined by the Supreme Court of Thailand which was a higher sum than what was awarded to the defendant and HLL in the 2007 Arbitration, the defendant still pursued the 2020 Arbitration on 13 July 2020 for the same claims.

[66] On the undisputed facts of this case, it is evident that the defendant had clearly abandoned its right to pursue a fresh arbitration under the PDA and is now estopped by its election from doing so. When the High Court set aside the award on 27 December 2012 and granted the consequential order for re-arbitration confined only to disputes arising under the PDA, the defendant and HLL were presented with two alternative and mutually exclusive courses of action moving forward — either appeal against the High Court's decision or accept the decision and commence a fresh arbitration under the PDA as ordered by the High Court.

[67] By its conduct, the defendant unequivocally elected to pursue a particular course of action, that is, to appeal against the High Court's decision right up to the Federal Court, Malaysia's apex court, in an attempt to defend and restore the award in its entirety. In doing so, the defendant had rejected the High Court's order for re-arbitration confined to the PDA and forfeited the opportunity granted to it to commence a fresh arbitration under the PDA via the 2020 Arbitration. This was a clear and conscious election made by the defendant and HLL not to avail themselves of the right to re-arbitrate the disputes with the plaintiff under the PDA when the occasion presented itself upon the High Court setting aside the award.

[68] Having opted to appeal and failed to overturn the High Court's decision up to the highest court of the land, the defendant cannot now seek to go back to exercise a right that was previously offered to it but which it had unequivocally rejected and given up. By its conduct in pursuing the appeals in the Malaysian courts from 2012 to 2017 and continuing with its action against the Banpu Group in the Thai Proceedings until 2018, while taking no steps whatsoever to commence a re-arbitration under the PDA, the defendant had represented to and led the plaintiff to believe that it was not seeking a fresh arbitration under the PDA and had abandoned that course of action. The defendant is therefore estopped from changing course and resiling from the position it had unequivocally adopted by its election.

[69] The legal principles on the doctrine of election were lucidly explained by the Federal Court in *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565; [1997] 3 CLJ 305 as follows:

> In the context of litigation, it usually arises where a party to an action has at least two alternative and mutually exclusive courses open to him. If by words or conduct he elects to pursue one of them and thereby leads his opponent to believe that he has abandoned the other, he may, if the circumstances so warrant, be precluded from later changing course.

[70] Similarly, in *Annie Quah Lay Nah vSyed Jafer Properties Sdn Bhd & Ors* [2007] 1 MLJ 225, the Court of Appeal held:

> If one of the parties to litigation is faced with two mutually exclusive alternatives and he elects to pursue one then he will be estopped from retreating from the position he has adopted by his election.

[71] Applying these principles to the present facts, the defendant, having been faced with two mutually exclusive alternatives post the High Court's decision and having elected to pursue one course of action to the exclusion of the other, is clearly estopped from now seeking to resurrect its right to re-arbitrate under the PDA which it had consciously abandoned. It would be inconsistent with the defendant's earlier election and unjust to the plaintiff for the defendant to be allowed to change course and reverse its position at this late stage. In the circumstances, I find that the doctrine of estoppel by election operates to preclude the defendant from commencing the 2020 Arbitration under the PDA.

[72] The defendant relies on the case of *Ghulam Mohammad Sayeed & Ors v Perwira Habib Bank (Malaysia) Bhd & Ors* [1989] 2 MLJ 375 (HC) to argue that the doctrine of estoppel by election does not apply to bar it from commencing the proposed fresh arbitration under Malaysian law. The case concerned an ex parte injunction order granted against some defendants, which contained an erroneous clause allowing them to apply to set it aside within two weeks. An issue that arose was whether the doctrine of election precluded the first defendant from applying to set aside the order after that two-week period, since it had also pursued other remedies like seeking an injunction. The court held that the doctrine of election did not apply, as the defendant had consistently indicated its intention to set aside the order, despite also pursuing other remedies. However, *Ghulam* is distinguished on the facts of the present case as here the defendant had maintained complete silence on the Malaysian front after losing in the Federal Court while pursuing its claims against the Banpu Group in Thailand. The only reasonable inference from the defendant's conduct of abandoning the Malaysian proceedings after failing in the Federal Court while obtaining remedies in Thailand is that the defendant had elected not to pursue re-arbitration in Malaysia. The defendant's sudden attempt to re-arbitrate was a complete shock. Further, due to the long 15-year delay caused by the defendant's election, the plaintiff would undoubtedly be prejudiced in defending the proposed fresh arbitration via the 2020 Arbitration, eg in procuring witnesses and documents. This detriment was not present in *Ghulam*.

[73] The undisputed facts of this case lead to the reasonable inference that the plaintiff was led to believe the defendant was not pursuing a fresh arbitration under the PDA and that the defendant had benefitted from its election to appeal against the setting aside of the award up to the Federal Court.

A **[74]** It is not disputed that the defendant had concurrently pursued its claims based on the Hongsa Project against the plaintiff in the 2007 Arbitration and the subsequent setting aside proceedings in the Malaysian courts, while also pursuing its claims against the Banpu Group in the Thai Proceedings. After the Federal Court dismissed the defendant's appeal and upheld the setting aside of the award on 17 August 2017, the defendant did not take any steps to commence a fresh arbitration in terms of the High Court's order for re-arbitration under the PDA. Instead, the defendant maintained complete silence on the Malaysian front while continuing to pursue its claims in the Thai Proceedings against the Banpu Group.

[75] It was only after the defendant succeeded in the Thai Proceedings and obtained an award of USD50m from the Supreme Court of Thailand on 6 March 2018 for its alleged losses in the Hongsa Project, which was a higher sum than that awarded in the 2007 Arbitration, that the defendant resurfaced in Malaysia by issuing the NOI to commence the 2020 Arbitration on 27 March 2020, some two years and seven months after the Federal Court's decision. This long period of silence and inaction on the defendant's part in relation to the Malaysian proceedings, while actively pursuing its claims in the Thai Proceedings and obtaining substantial recovery therefrom, would have led the plaintiff to reasonably believe that the defendant was no longer seeking any remedies against the plaintiff in Malaysia and was content to pursue its claims in relation to the Hongsa Project solely against the Banpu Group in Thailand.

[76] The defendant's conduct in focusing its efforts on pursuing its claims in the Thai Proceedings after the Federal Court's dismissal of its appeal, coupled with its extended silence before suddenly resurfacing to commence the 2020 Arbitration, raises a reasonable inference that the defendant had elected to abandon its rights in Malaysia and had opted instead to pursue its remedies in Thailand from which it benefited by obtaining a substantial award in its favour. If the defendant had intended to preserve its rights to commence a fresh arbitration under the PDA, it would have been expected to do so promptly after the Federal Court's decision, rather than remaining silent for a substantial period of time while pursuing its claims elsewhere.

[77] In the circumstances, based on the defendant's conduct as borne out by the undisputed chronology of facts, the irresistible inference that arises is that the plaintiff had been led to believe the defendant was no longer seeking a re-arbitration under the PDA in Malaysia and that the defendant had elected to pursue its remedies against the Banpu Group in Thailand from which it benefited. This fortifies the conclusion that the defendant is estopped by its election from now seeking to pursue the 2020 Arbitration against the plaintiff.

[78] In this regard, I accept that the proposed 2020 Arbitration is in effect an attempt by the defendant to recover what it had failed to recover in full through the Thai Proceedings by reverting to the re-arbitration route in Malaysia which it had consciously chosen not to pursue earlier. This is plainly not permissible in light of the binding nature of the defendant's election as explained above.

[79] The plaintiff has also been prejudiced by the defendant's conduct and the substantial lapse of time since the PDA was terminated. It is not disputed that the plaintiff's alleged causes of action against the defendant accrued on or about 5 October 2006 when the plaintiff issued the notice terminating the PDA. More than 15 years have since passed from that date.

[80] Over this considerable period of time, during which the defendant elected to pursue its appeal against the setting aside of the award and take its action against the Banpu Group in Thailand to its conclusion, the plaintiff's position has been materially altered to its detriment in relation to its ability to now defend the defendant's claims in the 2020 Arbitration. Given the long lapse of time, it is beyond doubt that the plaintiff would face real difficulty in procuring the necessary witnesses and documentary evidence to effectively resist the claims that the defendant now seeks to mount against the plaintiff in the 2020 Arbitration.

[81] The plaintiff's personnel who were involved in the PDA and the Hongsa Project at the material time and who would be needed as witnesses have since left its employment or are no longer available due to the long passage of time. Further, the relevant documents spanning the period of the PDA and the Hongsa Project some 15 years ago are unlikely to be readily available and would pose a real challenge for the plaintiff to locate and produce for the purposes of defending the 2020 Arbitration. This is particularly the case given the long period of silence and inaction by the defendant in the Malaysian proceedings after the Federal Court's dismissal of its appeal on 17 August 2017, which would have led the plaintiff to believe that the dispute with the defendant in relation to the PDA had been laid to rest, thereby making the continued preservation of evidence related to the long-concluded dispute unnecessary.

[82] It is therefore clear that the plaintiff would suffer substantial prejudice by reason of the defendant's action in now commencing the 2020 Arbitration after a lapse of more than 15 years from the termination of the PDA. Such prejudice arises from the difficulty and probable inability of the plaintiff to procure the necessary witnesses and documentary evidence to properly defend the claims in the 2020 Arbitration due to the long delay on the defendant's part in seeking to pursue its rights to re-arbitration under the PDA. This long delay was a direct result of the defendant's election to pursue its appeal against the

setting aside of the award through the hierarchy of the Malaysian courts and its subsequent pursuit of its action against the Banpu Group in Thailand, all of which had altered the plaintiff's position to its detriment.

[83] In the circumstances, allowing the defendant to now pursue the 2020 Arbitration would be inequitable to the plaintiff as the difficulty in securing evidence would hamper the plaintiff's ability to effectively defend the arbitration, thereby causing significant prejudice to the plaintiff by virtue of the defendant's election and the consequent long passage of time. This further supports the application of the doctrine of estoppel by election to preclude the defendant from commencing the 2020 Arbitration.

[84] In the premise, based on the doctrine of election in law, I hold that having elected not to re-arbitrate, the defendant is now bound by its election and is estopped from commencing a fresh arbitration against the plaintiff under the PDA. Accordingly, I make the declaration as prayed for by the plaintiff in para (b) of encl 1.

Limitation barring the 2020 Arbitration

[85] On the issue of whether the defendant is time-barred from commencing the proposed fresh arbitration, the plaintiff submits that the defendant's claims are time-barred under Malaysian limitation law, which the plaintiff contends is the applicable law for determining limitation issues. The plaintiff argues that the issue of limitation is a matter of procedural law governed by the law of the seat of arbitration, which is Malaysia.

[86] According to the plaintiff, pursuant to s 6(1)(a) of the Limitation Act, the defendant had six years from the accrual of the cause of action to commence arbitration. The plaintiff submits that the causes of action accrued in 2006 when the PDA and mining contracts were terminated, and the proposed fresh arbitration was only initiated in 2020, well beyond the six-year limitation period.

[87] The plaintiff contends that the defendant is not entitled to an extension or exclusion of time under s 30(5) of the Limitation Act because the defendant did not apply for such an order at the time the prior award was set aside by the Malaysian High Court or at any time thereafter. The plaintiff submits that in any event, even if time was excluded from 2007 when the 2017 Arbitration was commenced until it was finally set aside in 2017, the 2020 Arbitration would still be time-barred as it was commenced more than six years later in 2020.

[88] The plaintiff argues that allowing the proposed arbitration to proceed after such an inordinate delay would cause severe prejudice to the plaintiff and be contrary to the public policy underlying statutory limitation periods.

[89] On this issue, the defendant submits that the plaintiff has failed to show that the claims are time-barred under the PDA's governing law, which is New York law. The defendant contends that the plaintiff cannot rely on the Malaysian Limitation Act as a cause of action to argue that the proposed arbitration is time-barred.

[90] The defendant further argues that even if Malaysian limitation law applies, the defendant is not time-barred because the court has discretion under s 30(5) of the Limitation Act to exclude the period between the commencement of the previous arbitration and the date of the order setting aside that arbitration. According to the defendant, this means that time would only start to run from the Federal Court's dismissal of the defendant's appeal in 2017, and the 2020 Arbitration was commenced within six years from that date in 2020.

[91] The defendant also submits that any delay in commencing the 2020 Arbitration after the setting aside of the prior award does not automatically render the claims time-barred. The defendant contends that the court can exercise its discretion to grant an extension of time, and that in any event, it is for the new arbitral tribunal to decide on any limitation issues.

[92] Having carefully considered the submissions of both parties and the authorities cited, I find that the defendant is time-barred under the applicable limitation law from commencing the proposed fresh arbitration via the 2020 Arbitration.

[93] In my considered view, the issue of limitation must be determined in accordance with Malaysian law. It is a well established principle that limitation, being an issue of procedural law based on public policy considerations, is a statutory defence that falls to be decided by the law of the forum, ie the *lex fori*.

[94] This principle was affirmed by the Federal Court in *Othman & Anor v Mek* [1972] 2 MLJ 158. The case concerned a dispute over ownership of land between the legal representatives of the deceased parties to a previous jual janji agreement. An issue that arose was whether the plaintiffs' claim for a declaration that the defendant held the land in trust for them was barred by the doctrine of res judicata due to an earlier Court of Appeal decision. The court held that the Limitation Act, which had formed the basis for the Court of Appeal's dismissal of the earlier claim, is purely procedural and does not extinguish substantive rights, allowing the plaintiffs' claim based on their

equitable interest in the land to proceed. Ong CJ stated:

> Statutes of limitation (as in this case) which bar the remedy, but not the right, are rules of procedure only ...
>
> The plea of res judicata was wholly misconceived. The Court of Appeal, in effect, affirmed the decision of the lower court relating to the substantive rights of the appellants, and reversed the learned judge on a pure question of procedure relating to limitation ...

[95] The same principle was applied by Edgar Joseph Jr J (as he then was) in the High Court case of *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202. The case concerned a dispute between neighbors over alleged trespass, nuisance and a contractual right of way. An issue that arose was whether the plaintiffs' claims were barred by the Limitation Act. The court held that the Limitation Act is purely procedural, allowing a party's conduct in certain circumstances to estop them from relying on the limitation periods prescribed by the Act.

[96] Furthermore, the Federal Court in *Thai-Lao Lignite Co Ltd & anor v Government of the Lao People's Democratic Republic*, in considering the very same PDA between the same parties, has held that Malaysian law is the governing law of the arbitration agreement, being the law of the seat of the arbitration.

[97] The defendant's argument that the plaintiff cannot rely on limitation to bring an end to the 2020 Arbitration on the basis that limitation cannot be used as a cause of action but only as a defence is misplaced and untenable. This argument misconstrues the nature of the plaintiff's case and the manner in which limitation is being invoked by the plaintiff in these proceedings.

[98] In the present case, the plaintiff is not utilising limitation as a cause of action in and of itself. Rather, the plaintiff is rightfully invoking limitation as a defence to the 2020 Arbitration that has been initiated by the defendant against the plaintiff. The plaintiff's position is that the defendant's claims in the 2020 Arbitration are time-barred under the applicable Malaysian limitation law and the defendant is therefore not entitled in law to commence or maintain the 2020 Arbitration against the plaintiff.

[99] Seen in this light, it is abundantly clear that limitation is not being relied upon by the plaintiff as a cause of action, but rather as a statutorily recognised defence to the claims brought by the defendant in the 2020 Arbitration. There is nothing objectionable about this, as a defendant is indisputably entitled to raise limitation as a defence to a claim, even within the context of arbitration proceedings.

[100] Indeed, the plaintiff is entitled to rely on limitation as a proper legal basis to seek a declaration from the court that the defendant is time-barred from commencing a fresh arbitration under the PDA. This is because limitation, being a rule of statute, operates as an absolute bar to stale claims as a matter of law, not discretion.

[101] It is a well established principle that once a claim becomes time-barred under the applicable limitation law, the claim becomes unenforceable in law and the defendant acquires a right to rely on limitation as a complete defence to the claim

[102] This right accrues to a defendant by operation of law upon expiry of the limitation period. It matters not whether the issue of limitation is raised within the originating process itself or in subsequent proceedings. The defendant is entitled, as of right, to rely on limitation to resist the claim.

[103] For the defendant to argue that the plaintiff is precluded from relying on limitation to oppose the 2020 Arbitration is therefore fundamentally flawed. Limitation is a statutory defence that can be invoked by a defendant in any proceedings where a claim is brought after the expiry of the limitation period prescribed by law. There is no rule that limitation must be pleaded only as a defence within the four walls of the claim itself. A defendant may raise limitation in a separate proceeding to resist an action that has been commenced out of time, as the plaintiff is doing in the present case.

[104] In the premises, I find no merit in the defendant's contention that the plaintiff cannot rely on limitation to bring an end to the 2020 Arbitration. The plaintiff is properly invoking limitation as a statutorily recognised defence to the claims brought by the defendant in the 2020 Arbitration, not as a cause of action. The plaintiff is well entitled to do so as a matter of established legal principle.

[105] The defendant's attempt to rely on s 30(5) of the Limitation Act to save itself from being time-barred is also completely devoid of merit. Section 30(5) of the Limitation Act provides as follows:

> Where the High Court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration shall cease to have effect with respect to the dispute referred, the Court may further order that the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by this Act or any such written law as aforesaid for the commencement of proceedings (including arbitration) with respect to the dispute referred.

[106] A plain and literal interpretation of this provision makes it abundantly

clear that an order under s 30(5) ought to be sought from the High Court at the time when the court makes an order setting aside an arbitral award or terminating the arbitration proceedings. The use of the term 'further order' in the provision strongly suggests that the application for exclusion of time must be made together with, or immediately after, the primary order for setting aside of the award or termination of the arbitration.

[107] The High Court in the case of *Dceil Imex Sdn Bhd v Pembinaan Punca Cergas Sdn Bhd* [2014] 8 MLJ 51 affirmed this interpretation of s 30(5) in no uncertain terms. Nallini Pathmanathan J (as she then was) stated as follows at para [33]:

> It is evident that the order now sought by the respondent, in the normal course of events, ought to have been sought at or near the time when the court declared that the arbitration between the parties was 'null and void'. This is clear from the passage from Mustill referred to above.

[108] In the present case, it is not disputed that the defendant did not, at any time, make an application to the High Court under s 30(5) for an exclusion of the period between the commencement of the arbitration and the order of the court setting aside the award dated 27 December 2012. This order for exclusion of time ought to have been applied for by the defendant during the setting aside proceedings before the High Court or at the very latest immediately after the High Court decision was rendered. However, the defendant took no steps to do so.

[109] The evidence also shows that the defendant did not reserve its rights to make such an application at a later stage or to commence a fresh arbitration against the plaintiff. Having failed to seek the necessary order for exclusion of time under s 30(5) when the award was set aside, the defendant cannot now belatedly seek to invoke this provision to rescue the 2020 Arbitration from the statutory time bar.

[110] It is not open to the defendant to now argue that s 30(5) can still be invoked as no application has been filed by the defendant to date for the requisite exclusion of time. The defendant's bald assertion that 'this application can be made after a lapse of time' is plainly unsustainable and unsupported by any authority. As clearly stated in s 30(5) and affirmed by the High Court in *Dceil Imex*, an order for exclusion of time must be sought at or around the same time as the order for setting aside of the award or termination of the arbitration. The court that sets aside the award or terminates the arbitration must make the 'further order' for exclusion of time upon application by the party seeking the benefit of such exclusion.

[111] The court cannot at its own discretion exclude the relevant period of

time in computing the limitation period in a subsequent, unrelated proceeding commenced by a party after a substantial lapse of time. The correct legal position is that an application for exclusion of time under s 30(5) must be promptly made before the court that sets aside the award or terminates the arbitration, failing which the party loses its entitlement to the exclusion. The defendant's failure to do so in this case therefore disentitles it from relying on s 30(5) to save the 2020 Arbitration from being barred by limitation under Malaysian law.

[112] In the premises, I find the defendant's argument that s 30(5) of the Limitation Act can be invoked at this juncture to preserve its rights to commence the 2020 Arbitration to be utterly devoid of merit and unsustainable in law. The defendant having failed to seek the necessary exclusion of time when the award was set aside by the High Court on 27 December 2012, it is now far too late for the defendant to seek to rely on this provision. An order under s 30(5) can only be made by the court that sets aside the award or terminates the arbitration and, as expressly stated in the provision itself, this must be done by way of a 'further order' together with or immediately following the primary order. There is no basis for the defendant to assert that such an order can be made by this court in the present proceedings, which have been commenced by the defendant more than a decade after the High Court decision.

[113] The defendant relied on the *Dceil Imex* case to argue that even if the defendant had not made an application under s 30(5) of the Limitation Act to exclude the period of time for commencing a fresh arbitration after the previous award was set aside, this court still has the discretion to make such an order excluding that time period. The case concerned a dispute where an arbitration between the parties was declared null and void by the court under s 18(8) of the Arbitration Act 2005. An issue that arose was whether the court could exclude the period between the commencement of the arbitration and the date it was declared null and void from the computation of the limitation period for the defendant's counterclaim, pursuant to Section 30(5) of the Limitation Act. The court held that s 30(5) could be invoked in conjunction with s 18(8) of the Arbitration Act 2005, and exercised its discretion to exclude the relevant time period, allowing the defendant to pursue its counterclaim within the limitation period.

[114] Specifically, the defendant pointed to para 37 of the judgment, where the Nallini Pathmanathan J (as she then was) stated:

> The only 'flaw' as it were in this case is that the respondent seeks to have this order made some two and a half years after the order declaring the arbitration null and

void was made. Does this delay in itself therefore render this court functus officio? To my mind, it does not because the delay in itself does not alter the nature of the order sought to be obtained.

[115] Her Ladyship went on to allow the respondent's application under s 30(5) to exclude the time period despite the delay of 2.5 years in making the application.

[116] However, the defendant's reliance on the High Court decision in *Dceil Imex* is misplaced as that case is clearly distinguishable from the present case on its facts and circumstances.

[117] In *Dceil Imex*, there was a unique and extraordinary factual matrix which culminated in the respondent only making the application under s 30(5) of the Limitation Act some 2.5 years after the award had been set aside by the High Court. This was due to the peculiar circumstances of that case, where there were overlapping claims in both the arbitration proceedings and a separate civil suit between the parties. This resulted in a number of intervening events which prevented the respondent from promptly seeking an order for exclusion of time under s 30(5).

[118] Specifically, the arbitration proceedings in *Dceil Imex* had to be stayed as the appellant was ordered to be wound up. In the meantime, the respondent sought to pursue its claim against the appellant in the civil suit but the appellant objected on the grounds that the respondent required leave from the arbitrator to proceed with its counterclaim in the suit. The respondent then applied to the arbitrator for the requisite leave which was granted. However, on the appellant's further appeal, the High Court subsequently ruled that the arbitrator had no jurisdiction to grant such leave and thus the arbitration proceedings were null and void. Crucially, at the time of this High Court ruling, limitation had not yet set in. The respondent therefore still had the opportunity to have its counterclaim against the appellant determined in the civil suit.

[119] It was only much later, after the respondent successfully applied to join the appellant in the civil suit, that limitation became an issue when the appellant applied to strike out the respondent's counterclaim on the grounds that it was time-barred. It was in those circumstances that the respondent had to apply to the High Court for an order under s 30(5) some 2.5 years after the arbitration had been declared null and void. The High Court, having regard to the 'peculiar factual matrix' of the case, was prepared to grant the application, treating the order sought by the respondent as a 'consequential order' to the earlier order declaring the arbitration null and void.

[120] Therefore, it was only because of the unique facts and intervening events in *Dceil Imex*, in particular the appellant's winding up and the existence of overlapping claims in the arbitration and civil suit, that necessitated the belated application under s 30(5) which was exceptionally allowed by the High Court in the exercise of its discretion.

[121] In stark contrast, on the facts of the present case, by the time the High Court delivered its decision setting aside the award on 27 December 2012, the defendant's causes of action against the plaintiff for breach of contract and tort were already long time-barred, the limitation period of six years having expired by 5 October 2012 at the very latest. This is because the defendant's causes of action would have accrued by 5 October 2006 at the latest, when the PDA was wrongfully terminated by the plaintiff. Unlike in *Dceil Imex*, there was no possibility of the defendant's claim being kept alive by any overlapping proceedings in a civil court. The setting aside of the award by the High Court therefore represented the last opportunity for the defendant to preserve its right to pursue its claim against the plaintiff in a fresh arbitration.

[122] Despite being given the liberty by the High Court to 're-arbitrate' the dispute with the plaintiff under the PDA, the defendant unequivocally elected not to do so. The defendant did not make any application under s 30(5) of the Limitation Act for the period of the prior arbitration proceedings to be excluded in the computation of the limitation period. Neither did the defendant take any steps to reserve its right to commence a fresh arbitration against the plaintiff. Instead, the defendant proceeded to pursue appeals against the High Court's decision to the Court of Appeal and the Federal Court. Concurrently, the defendant also commenced fresh proceedings against the Banpu Group in the courts of Thailand.

[123] By electing to undertake the aforesaid course of action, in the face of the award having been set aside by the High Court without any reservation of the right to re-arbitrate or any application for exclusion of time under s 30(5), the defendant must be taken to have consciously and unequivocally foregone its right to pursue a fresh arbitration against the plaintiff. The defendant's conduct clearly evinced a decision to challenge the setting aside order made by the High Court instead of re-arbitrating the dispute with the plaintiff afresh. The Thai Proceedings, on the other hand, demonstrated the defendant's intention to pursue its claim in a different forum against different parties.

[124] In these circumstances, and in the absence of any order under s 30(5) excluding the period of the prior arbitration proceedings in computing the applicable limitation period, there is no basis for the defendant to now contend that the 2020 Arbitration was commenced within time. The limitation period for all the defendant's causes of action against the plaintiff, whether in contract

or tort, had long expired by the time the High Court set aside the award on 27 December 2012. More than a decade has since lapsed. It is simply far too late for the defendant to now seek to rely on s 30(5) to revive its otherwise time-barred claim against the plaintiff. The facts of the present case are in no way comparable to the exceptional circumstances that existed in *Dceil Imex* which justified the High Court's decision to allow the belated application under s 30(5) in that case.

[125] For these reasons, I find that *Dceil Imex* is wholly distinguishable and does not assist the defendant. That case turned on its own peculiar facts which justified the court's exercise of discretion to grant an order under s 30(5) of the Limitation Act some 2.5 years after the arbitration had been declared null and void. No such special circumstances exist in the present case to warrant this court granting a similar indulgence to the defendant. The defendant had every opportunity to preserve its right to bring a claim against the plaintiff in a fresh arbitration following the High Court decision but consciously elected not to do so. The defendant must now live with the consequences of its own decision. It cannot rely on s 30(5) to rescue it from its self-induced predicament.

[126] Even assuming, for the sake of argument, that the defendant had the presence of mind to invoke s 30(5) of the Limitation Act at the time when the award was set aside by the High Court on 27 December 2012, the defendant would still find itself time-barred in respect of the 2020 Arbitration. This is because the period of time that could be excluded by reason of s 30(5), even if an order to that effect had been obtained from the High Court as prescribed, would be insufficient to bring the 2020 Arbitration within the applicable six-year limitation period under Malaysian law.

[127] To elaborate, s 30(5) provides for the exclusion of the period between the commencement of the arbitration proceedings and the date of the order of the court setting aside the award. In the present case, this would be the period from 26 June 2007, being the date of commencement of the 2007 Arbitration, until 27 December 2012, being the date of the High Court order setting aside the award issued in the 2007 Arbitration.

[128] This means that even if time had stopped running for the duration of the 2007 Arbitration by virtue of a s 30(5) order made together with the High Court decision, time would start running again immediately thereafter. Therefore, the defendant would have to calculate the remaining period of the six year limitation that it had left, commencing from the date of termination of the PDA, to determine the deadline for commencement of a fresh arbitration against the plaintiff.

[129] The cause of action for the defendant's claim against the plaintiff under the PDA would have accrued at the very latest by 5 October 2006, this being the date when the plaintiff wrongfully terminated the PDA. From this date until the commencement of the 2007 Arbitration on 26 June 2007, approximately eight months and 20 days had lapsed.

[130] As such, at the time of commencement of the 2007 Arbitration, the defendant would have had five years, three months and ten days remaining before its claim against the plaintiff became time-barred. Applying s 30(5), this remaining limitation period would then be suspended for the duration of the 2007 Arbitration until the award was eventually set aside by the High Court decision on 27 December 2012.

[131] Therefore, the defendant would have to calculate the expiry of the limitation period by adding the remaining five years, three months and ten days to the date of the High Court decision. Accordingly, time would start running again on 28 December 2012 and the six-year limitation period for the defendant's claim would expire around 7 April 2018. This would be the deadline for the defendant to bring a fresh arbitration against the plaintiff in order to avoid being time-barred.

[132] However, it is undisputed that the defendant only commenced the 2020 Arbitration against the plaintiff in July 2020 vide its notice of arbitration dated 13 July 2020. This was more than two years after the expiry of the six-year limitation period, even taking into account the excluded period of the 2007 Arbitration by reason of s 30(5).

[133] The inescapable conclusion is that even if the defendant had invoked s 30(5) at the time of the High Court decision and obtained the necessary exclusion of time, the defendant would still have been time-barred by the time it commenced the present arbitration in July 2020. The period of time that could be excluded under s 30(5) was simply not enough to extend the limitation period beyond July 2020. At most, it could only extend the limitation period to 7 April 2018, as calculated above. By commencing the 2020 Arbitration some two years and three months after this deadline, the defendant was clearly out of time.

[134] Seen in this light, it is abundantly clear that the defendant's failure to commence a fresh arbitration against the plaintiff within the prescribed limitation period cannot be cured by any reliance on s 30(5), even if the requisite order had been obtained from the High Court at the material time together with the setting aside of the award on 27 December 2012. The period of exclusion allowed under s 30(5) would still be insufficient to render the 2020 Arbitration commenced in July 2020 within time.

[135] In the premises, any argument by the defendant that it can avoid being time-barred in the present proceedings by reason of s 30(5) is plainly unsustainable. That ship has long sailed. Applying the provision to exclude the period of the prior arbitration proceedings from June 2007 to December 2012 does not assist the defendant in any way, as on any calculation the six-year limitation period would have still expired by April 2018 at the latest, long before the 2020 Arbitration was commenced. In this regard, the defendant's attempted reliance on s 30(5) is nothing more than a red herring which ought to be rejected by this court.

[136] For the above reasons, I find that the defendant is time-barred from commencing the 2020 Arbitration against the plaintiff under the PDA. As a matter of law, the defendant is not entitled to commence a fresh arbitration. I therefore allow the plaintiff's application in encl 1 and grant the declaration prayed for in para (e) that the defendant is time-barred from commencing the proposed fresh arbitration in the 2020 Arbitration against the plaintiff as the limitation period for the defendant to bring a claim pursuant to the causes of action under the PDA and/or in tort have expired.

Meeting the high threshold for the granting of an anti-arbitration injunction to restrain the defendant's fresh arbitration

[137] The plaintiff contends that the high threshold for the granting of an anti-arbitration injunction to restrain the defendant's proposed fresh arbitration in the 2020 Arbitration has been met in the present case. The plaintiff argues that allowing the 2020 Arbitration to proceed would cause injustice to the plaintiff, and that it would be oppressive, vexatious, unconscionable and an abuse of process in the circumstances.

[138] The defendant submits that the plaintiff has failed to meet this high threshold. It contends that the plaintiff will not suffer injustice if the 2020 Arbitration proceeds, as the defendant is merely exercising its contractual rights under the arbitration agreement in the PDA which remains valid and binding. The defendant further argues that the 2020 Arbitration is not oppressive, vexatious, unconscionable or abusive as it concerns different claims from those pursued in the earlier arbitration and court proceedings.

[139] Having carefully considered the extensive submissions of both parties, I am persuaded that the plaintiff has in fact met the high threshold to justify the grant of an anti-arbitration injunction in the exceptional circumstances of this case.

[140] The authorities make clear that while the court should be slow to interfere with the arbitral process, it retains the power to grant injunctions to restrain arbitral proceedings where it would be oppressive, vexatious, unconscionable or an abuse of process to allow the arbitration to continue (*J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] EWHC 1262 (TCC) (English CA); *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1 (FC)). This is assessed by considering whether the injunction would cause injustice to the claimant in the arbitration, and whether continuation of the arbitration would work an injustice by being oppressive, vexatious, unconscionable or abusive in some way.

[141] Applying these principles, I find that the defendant will not suffer injustice if the 2020 Arbitration is restrained. The evidence shows the defendant has already obtained, in the Thai Proceedings, an award of USD50m representing the full investment costs it had incurred in the Hongsa Project. This is in fact a higher sum than the USD40m awarded (but later set aside) in the 2007 Arbitration for largely the same 'total investment costs' claim. Further, the Thai courts dismissed the defendant's claims for 'loss of benefits'. In these circumstances, restraining the 2020 Arbitration, in which the defendant seeks to claim again for its 'investment costs in the Hongsa Project' and 'loss of profits from the Hongsa Project', will not cause injustice. The defendant has had its day in court and obtained a remedy.

[142] On the other hand, I am satisfied that allowing the 2020 Arbitration to continue would be oppressive, vexatious, unconscionable and an abuse of process against the plaintiff. The key facts are stated again as follows:

(a) the original 2007 Arbitration dealt with disputes arising from the PDA. The defendant there claimed for its 'total investment cost' and 'lost profits' in the Hongsa Project. In the award dated 4 November 2009, the Tribunal allowed the claim for 'total investment costs' in the sum of USD40m but dismissed the claim for 'lost profits';

(b) that award was set aside by the Malaysian High Court on 27 December 2012, with an order for re-arbitration confined to disputes under the PDA. However, the defendant did not re-arbitrate but instead appealed all the way to the Federal Court to try to reinstate the award. The Federal Court on 17 August 2017 upheld the setting aside and set aside the order for re-arbitration, bringing finality to the original arbitral proceedings;

(c) meanwhile, the defendant had pursued largely the same claims in the Thai Proceedings against other entities (the Banpu Group). In its complaint there, the defendant claimed for 'investment costs' and 'loss of benefits' in the Hongsa Project. On 6 March 2018, the Thai Supreme

Court awarded the defendant USD50m for its investment costs (which the defendant has since been paid in full) but dismissed the claim for loss of benefits; and

(d) now, after all the above proceedings have concluded, the defendant seeks to commence the 2020 Arbitration in July 2020, more than 13 years after the alleged breaches, again claiming for its 'investment costs in the Hongsa Project' and 'loss of profits' from the Hongsa Project.

[143] In my judgment, these facts taken cumulatively show an abuse of process by the defendant seeking duplicative remedies and re-litigating issues already decided. The claims and issues in the 2020 Arbitration are substantially the same as those already ventilated at length and finally determined in the various fora above. The doctrines of res judicata in the form of issue estoppel, and abuse of process, apply to prevent this re-litigation.

[144] It matters not that some of the earlier decisions were between the defendant and other parties like the companies in the Banpu Group. The public interest in finality of litigation and consistency of decisions remain the same. A broad approach to applying issue estoppel and abuse of process, as explained in cases like *Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2016] 3 MLJ 122 (CA) and *Kerajaan Malaysia v Mat Shuhaimi bin Shafiei* [2018] 2 MLJ 133; [2018] 3 CLJ 1 (FC), justifies looking at the substance and not form of the multiple proceedings.

[145] Here, the defendant has already claimed for and been awarded its 'investment costs', and had its claims for 'loss of benefits' dismissed, notwithstanding these were in proceedings involving some different parties. It cannot be permitted to pursue these claims again under the guise of the 2020 Arbitration. To allow this would be to condone a vexatious attempt at double recovery, which would bring the administration of justice into disrepute among right-thinking people (*Kerajaan Malaysia v Mat Shuhaimi bin Shafiei*).

[146] Further, the inordinate delay of more than 13 years from the alleged breaches to the commencement of the 2020 Arbitration would make it unconscionable and oppressive to require the plaintiff to defend these stale claims again. This is compounded by the defendant not promptly commencing a re-arbitration when the original award was set aside in 2012, but instead pursuing fruitless reinstating appeals.

[147] Therefore, in the unique and exceptional circumstances of this case, I am amply satisfied that the high threshold for an anti-arbitration injunction has been crossed. The plaintiff's application is accordingly allowed, with the defendant to pay the plaintiff's costs of this application.

Prayers (c) and (d) of the originating summons

[148] In relation to prayers (c) and (d) of the originating summons, I did not find it necessary to make any orders. I will explain my reasons below.

[149] Firstly, with prayers (a), (b) and (e) of the originating summons having been allowed, this was sufficient basis for me to order prayer (f), which was to restrain the defendant from proceeding with the arbitration commenced by its notice of arbitration dated 13 July 2020. In other words, even without making orders on prayers (c) and (d), I was satisfied that the orders made on prayers (a), (b) and (e) warranted the granting of the injunctive relief sought in prayer (f).

[150] Secondly, during the hearing, plaintiff's counsel took the position that if any one of prayers (a) to (e) was ordered, that would be adequate grounds to grant prayer (f), which counsel submitted was the ultimate objective of the plaintiff in filing this originating summons. I agreed with this submission.

[151] Thirdly, prayers (b) to (e) were framed in the alternative. Therefore, once I decided to allow prayers (a) and (b), it became unnecessary for me to make any ruling on prayers (c) and (d) for the purpose of ordering prayer (f). Put another way, the plaintiff did not need to succeed in all its prayers in order to obtain the injunction sought in prayer (f).

[152] Lastly, my decision to allow prayers (a), (b) and (e) were determinative of the dispute between the parties in this originating summons. Granting those prayers effectively disposed of the matter in its entirety, rendering a ruling on prayers (c) and (d) academic.

[153] For the reasons above, there was no necessity for me to make any orders on prayers (c) and (d) of the originating summons. The orders I granted on prayers (a), (b), (e) and (f) conclusively determined the originating summons.

CONCLUSION

[154] In conclusion, having considered the evidence and submissions of the parties in their entirety, I find that the plaintiff has met the high threshold for the grant of an anti-arbitration injunction to restrain the defendant's attempt to commence a fresh arbitration under the PDA in the 2020 Arbitration. The defendant is bound by the earlier decisions of the Malaysian courts and the Thai courts which have brought finality to the dispute between the parties, and it would be oppressive and an abuse of process to allow the defendant to re-litigate the same issues that have been finally determined in multiple fora. Further, the defendant's claim is in any event time-barred under the Limitation Act, and it is estopped by its own election from pursuing the proposed

re-arbitration which it had consciously abandoned in favour of other proceedings. In light of the exceptional circumstances of this case, it is therefore just and appropriate to grant a permanent anti-arbitration injunction to bring an end to this protracted dispute once and for all.

[155] Accordingly, I allow the plaintiff's application in encl 1 and hereby order as follows:

(a) the decision of the Federal Court of Malaysia on 17 August 2017 dismissing the appeal of the defendant based on the arbitral award dated 4 November 2009 between the Parties has brought about finality to the dispute between the parties;

(b) the defendant is estopped from commencing a fresh arbitration against the plaintiff under the PDA dated 22 July 1994;

(c) the defendant is time-barred from commencing a fresh arbitration against the plaintiff under the PDA;

(d) the defendant be restrained, either through itself and/or its solicitors and/or its agents or otherwise from taking any further steps in the arbitral proceedings commenced or sought to be commenced by the defendant against the plaintiff vide a notice of arbitration dated 13 July 2020; and

(e) costs of RM70,000 be born and paid forthwith by the defendant subject to allocatur fee.

OS allowed.

Reported by Ashok Kumar